

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In the Matter of )  
 )  
 Amendment of Section 73.202(b), ) MB Docket No. 03-222  
 Table of Allotments, ) RM - 10812  
 FM Broadcast Stations )  
 (Charlotte and Grand Ledge, Michigan) )

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: Marlene H. Dortch, Office of the Secretary  
 Attn: Assistant Chief, Audio Division  
 Media Bureau

**REPLY TO OPPOSITION**

Rubber City Radio Group ("RCRG"), licensee of WQTX(FM), Charlotte, Michigan, by its counsel and pursuant to Section 1.45(c) of the Commission's Rules, hereby replies to the opposition of Christian Broadcasting System, Ltd ("CBSL") filed in the above-captioned proceeding on February 2, 2004.<sup>1</sup> CBSL opposes RCRG's motion to dismiss the counterproposal filed by CBSL.

1. As RCRG has pointed out in its reply comments in this proceeding,<sup>2</sup> CBSL has not filed a timely counterproposal. Rather, on the comment date, Christian Broadcasting System, Ltd. ("CBSL") merely filed a notice of its intention to file an application to relocate AM station WLCM from Charlotte to Holt, Michigan. CBSL did, in fact, file such an application, one month later. That application is mutually exclusive with RCRG's petition in the sense that both cannot be granted without depriving Charlotte, Michigan of its local services.

<sup>1</sup> Section 1.45 of the Commission's Rules sets a reply deadline of five days from the time for filing oppositions 47 C.F.R. § 1.45(c). This late reply is accompanied by a motion for its acceptance.

<sup>2</sup> Reply Comments of Rubber City Radio Group filed Dec 30, 2003.

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2 In its opposition, CBSL contends that its *Ashbacker*<sup>3</sup> rights would be violated if its Holt application were not considered in this proceeding. See Opposition at 4-5, citing *Kessler v FCC*, 326 F.2d 673 (D.C. Cir. 1963). However, this contention is clearly incorrect. *Ashbacker* rights accrue only to applicants, not potential applicants. *Reuters, Ltd v FCC*, 781 F.2d 946 (D.C. 1986). *Kessler*, cited by CBSL, is not to the contrary. The court held there that *Ashbacker* required consideration of an application that was timely filed despite a temporary filing freeze. In this case, CBSL did *not* file an application in time to be considered together with the proposals in this proceeding. It could have filed such an application, just as the applicant in *Kessler* did, and it might have accompanied such an application with a request for waiver of the filing window rules. CBSL states that its application “could have and would have been filed” on time to be considered in this proceeding, but the fact remains that it was not. Therefore, *Ashbacker* does not apply.

3. Because CBSL did not file a cognizable proposal on time to be considered in this proceeding, its analysis of the case law cited by RCRG is incorrect as well. *Harrisburg and Albemarle, North Carolina*, 7 FCC Rcd 108 (1992), *recon. denied*, 11 FCC rcd 2511 (1996) is precisely on point. There, as here, two proposals are before the Commission, only one of which can be granted, and the two are *not* entitled to comparative consideration. In such cases, the first filed clearly has priority over the second. *Accord, Galveston and Missouri City, Texas*, 16 FCC Rcd 747 (2001). RCRG’s proposal was filed first. Therefore, CBSL’s later-filed application must be treated as removing Charlotte’s sole local service.

4 RGRC pointed out that the Commission cannot accept into this proceeding CBSL’s application filed *one month* late unless it is also willing to accept in other cases

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<sup>3</sup> *Ashbacker Radio Corp v FCC*, 326 U S 327 (1945)

applications filed up to *four years* late, given the recent spacing of application filing windows. CBSL has no solution to this concern except to admit that the Commission's rules do not address the situation in which CBSL finds itself. *See* Opposition at 5. CBSL has not set forth any rational processing scheme that would admit its application into this proceeding, nor any compelling reason that such a processing scheme should be developed. The Commission has no grounds to expand this proceeding to include the CBSL application.

For the foregoing reasons, the Commission should dismiss CBSL's "counterproposal" and give it no consideration in this proceeding.

Respectfully submitted,

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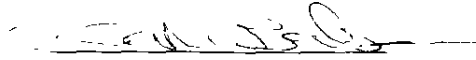
February 26, 2004

**CERTIFICATE OF SERVICE**

I, Lisa M. Balzer, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 26th day of February, 2004 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Reply to Opposition" to the following:

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\* Hand Delivered